



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 28, 2021

Mr. Craig M. Price
Assistant District Attorney
Grayson County Criminal District Attorney's Office
200 South Crockett Street, Suite 116A
Sherman, Texas 75090

OR2021-29865

Dear Mr. Price:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 913158.

The Grayson County Criminal District Attorney's Office (the "district attorney's office") received two requests from the same requestor for a specified case file. You claim some of the submitted information is not subject to the Act. You further claim the submitted information is excepted from disclosure under sections 552.101, 552.111, and 552.1325 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, you state Exhibit 4 consists of a grand jury subpoena and information obtained pursuant to the grand jury subpoena. The Act is applicable to information "written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body." Gov't Code § 552.002(a)(1). The judiciary is expressly excluded from the requirements of the Act. *See id.* § 552.003(1)(B); *see also id.* § 552.0035 (access to judicial records is governed by rules adopted by Supreme Court of Texas or other applicable laws or rules). This office has determined a grand jury, for purposes of the Act, is a part of the judiciary and therefore is not subject to the Act. *See Open Records Decision No. 411 (1984)*. Further, records kept by another person or entity acting as an agent for a grand jury are considered to be records in the constructive possession of the grand jury and therefore are not subject to the Act. *See Open Records Decisions Nos. 513 (1988), 398 (1983)*. *But see ORD 513 at 4* (defining limits of judiciary exclusion). The fact that information collected or prepared by another

person or entity is submitted to the grand jury does not necessarily mean that such information is in the grand jury's constructive possession when the same information is also held in the other person's or entity's own capacity. Information held by another person or entity but not produced at the direction of the grand jury may well be protected under one of the Act's specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* ORD 513. To the extent the district attorney's office holds Exhibit 4 solely as an agent of the grand jury, such information consists of records of the judiciary that are not subject to disclosure under the Act and the district attorney's office is not required to release that information in response to the instant requests.¹ To the extent the district attorney's office does not hold the information at issue solely as an agent of the grand jury, the information is subject to the Act and we will address the submitted arguments against its disclosure.

Next, you acknowledge, and we agree, the district attorney's office did not comply with the procedural requirements of section 552.301 of the Government Code in requesting this decision with respect to the first request. *See* Gov't Code § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). Further, in failing to comply with the procedural requirements of section 552.301 in relation to the first request, the district attorney's office failed to comply with section 552.301 with respect to the same information responsive to the second request. *See* Gov't Code § 552.007 (prohibiting selective disclosure of information); Open Records Decision No. 463 at 1-2 (1987). Because sections 552.101, 552.130, and 552.1325 can provide compelling reasons to overcome the presumption of openness, we will address their applicability to the submitted information.² However, we find you have failed to establish a compelling reason to address your remaining claims.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of the MPA provides, in relevant part, as follows:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as physician to the patient, is

¹ In this instance, as we are able to make this determination, we need not address your remaining arguments against disclosure of this information.

² The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* § 159.002, Act of May 31, 2021, 87th Leg., R.S., H.B. 549, § 4 (to be codified at Occ. Code § 159.004). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We have further found when a file is created as a result of a hospital stay, all the documents in the file referring to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990).

Upon review, we find a portion of the submitted information constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician or someone under the supervision of a physician that were created or are maintained by a physician. Accordingly, the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA.³ However, we find you have not demonstrated any portion of the remaining information consists of medical records for purposes of the MPA, and the district attorney's office may not withhold any of the remaining information under section 552.101 in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses article 20A.202(a) of the Code of Criminal Procedure, which provides “[g]rand jury proceedings are secret.”⁴ Crim. Proc. Code art. 20A.202(a). However, article 20A.202 does not define “proceedings” for purposes of subsection (a). The Fourth Court of Appeals in *In re Reed* addressed the issue of what constitutes “proceedings” for purposes of the statutory predecessor of article 20A.202 and stated the term “proceedings” could “reasonably be understood as encompassing matters that take place before the grand jury, such as witness testimony and

³ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

⁴ We understand you to raise article 20A.202, rather than the former article 20.02 of the Code of Criminal Procedure.

deliberations.” *See In re Reed*, 227 S.W.3d 273, 276 (Tex. App.—San Antonio 2007, orig. proceeding).

Subsequent to the ruling in *Reed*, the 80th Legislature, modeling federal law, added the statutory predecessor to subsection (b) of article 20A.202. *See* Crim. Proc. Code art. 20A.202; FED. R. CRIM. P. 6(e)(6) (“Records, orders, and subpoenas relating to grand jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.”). Article 20A.202(b) states “[a] subpoena or summons relating to a grand jury proceeding or investigation must be kept secret to the extent and for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury.” Crim. Proc. Code art. 20A.202(b). However, this provision does not define or explain what factors to consider in making such a determination, and even if we considered article 20A.202 to be a confidentiality provision, information withheld under this statute would be secret only “for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury.” *Id.*

You seek to withhold some of the remaining information under article 20A.202. However, we conclude you have not explained how the matters upon which the information at issue were based are still “before the grand jury” to warrant keeping the information secret. Thus, upon review of article 20A.202 and related case law, it is not apparent, and you have failed to otherwise explain, how this provision makes the information at issue confidential. *See* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Therefore, the district attorney’s office may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with article 20A.202 of the Criminal Code of Procedure.

Next, you seek to withhold some of the remaining information pursuant to article 39.14 of the Code of Criminal Procedure. We note, however, article 39.14 governs the discovery of information and testimony of witnesses in criminal proceedings. *See* Crim. Proc. Code art. 39.14. Article 39.14 does not expressly make information confidential for purposes of the Act. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality under section 552.101 must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2; *see also* Open Records Decision No. 575 at 2 (1990) (explicitly stating discovery privileges are not covered by statutory predecessor to section 552.101). Therefore, we conclude the district attorney’s office may not withhold any of the remaining information under article 39.14 of the Code of Criminal Procedure.

Section 552.1325 of the Government Code provides the following:

(a) In this section:

- (1) “Crime victim” means a person who is a victim as defined by Article 56B.003, Code of Criminal Procedure.
- (2) “Victim impact statement” means a victim impact statement under Subchapter D, Chapter 56A, Code of Criminal Procedure.

(b) The following information that is held by a governmental body or filed with a court and that is contained in a victim impact statement or was submitted for purposes of preparing a victim impact statement is confidential:

(1) the name, social security number, address, and telephone number of a crime victim; and

(2) any other information the disclosure of which would identify or tend to identify the crime victim.

Gov't Code § 552.1325. The definition of a victim under article 56B.003 of the Code of Criminal Procedure includes an individual who suffers personal injury or death as a result of criminally injurious conduct. Crim. Proc. Code art. 56B.003(14). The remaining information includes a victim impact statement as defined by Subchapter D, Chapter 56A of the Code of Criminal Procedure. *See, e.g., id.* art. 56A.151. The information at issue reflects the victim suffered personal injury as a result of the criminally injurious conduct. Thus, we find the individual who completed the impact statement is a victim for purposes of article 56B.003, and thus is a crime victim for purposes of section 552.1325. We have marked information that consists of the name, address, and telephone number, and other identifying information of a crime victim. Accordingly, the district attorney's office must withhold the information we have marked under section 552.1325 of the Government Code. However, we find you have failed to demonstrate the applicability of section 552.1325 to any of the remaining information at issue. Accordingly, the district attorney's office may not withhold any of the remaining information on the basis of section 552.1325 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the doctrine of the common-law privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. The Third Court of Appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *See Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App—Austin May 22, 2015, pet. denied) (mem. op.). Upon review, we find some of the remaining information pertains to individuals who are de-identified and whose privacy interests are, thus, protected. Therefore, the district attorney's office must withhold the identifiable public citizen's date of birth in the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code excepts from public disclosure information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country. *See* Gov't Code § 552.130. Accordingly, the district attorney's office must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

In summary, to the extent the district attorney's office holds Exhibit 4 solely as an agent of the grand jury, such information consists of records of the judiciary that are not subject to disclosure under the Act and the district attorney's office is not required to release that information in response to the instant requests. The district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA. The district attorney's office must withhold the information we have marked under section 552.1325 of the Government Code. The district attorney's office must withhold the identifiable public citizen's date of birth in the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy. The district attorney's office must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The district attorney's office must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Tim Neal
Assistant Attorney General
Open Records Division

TN/jm

Ref: ID# 913158

Enc. Submitted documents

c: Requestor
(w/o enclosures)